IN THE

Supreme Court of the Unitee States

OCTOBER TERM, 1943

No.....

J. L. WILKEY AND J. L. WILKEY ADJUSTER, INC.,
Petitioners,

v.

STATE OF ALABAMA, EX REL., JIM C. SMITH AND JIM C. SMITH, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Court Below

The opinion of the Supreme Court of Alabama, found as "A" in Appendix to Petition (also R.

274), the highest Court of the State, of which complaint is here made, is reported as:

Wilkey v. State, 14 So. (2d) 536.

Opinions of the Supreme Court of Alabama on previous appeals in the same case deciding points not here material are reported as follows:

Wilkey v. State, 238 Ala. 121; 189 So. 198;
Wilkey v. State, 238 Ala. 595; 192 So. 588; 129 A.L.R. 549.

An opinion of the Supreme Court of Alabama in a case to which these petitioners were parties respondent and the Birmingham Bar Association was a party complainant, involving much the same question is:

Birmingham Bar Association v. Phillips & Marsh, J. L. Wilkey, et al., 239 Ala. 650; 196 So. 725.

II.

Jurisdiction

(1) Jurisdiction is conferred upon this Court by Section 237 (b) of the Judicial Code as amended by Act of Congress of February 13th, 1925, (U.S.C.A., Title 28, Section 344 (b)).

(2) The original judgment of the Supreme Court of Alabama was rendered on the 13th day of May, 1943 (R. 274). An application for rehearing was

duly filed on the 26th day of May, 1943, within the time allowed by Rule 38 of the Supreme Court of Alabama. (Appendix to Title 7, Code of Alabama of 1940, page 1018.) The application for a rehearing was denied on June 30, 1943.

III.

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity, the statement is not repeated here.

IV.

Specifications of Error

(1) The Supreme Court of Alabama erred in holding that subdivision (d) of Section 42, Title 46 of the Code of Alabama of 1940 as construed by the Court is constitutional.

(2) The Supreme Court of Alabama erred in holding that subdivision (d) of Section 42, Title 46 of the Code of Alabama of 1940 as construed by that Court does not deny to the petitioners and other "independent insurance adjusters" equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(3) The Supreme Court of Alabama erred in holding that subdivision (d) of Section 42, Title 46 of the Code of Alabama of 1940 as construed by that Court does not deprive petitioners of liberty or property without due process of law.

(4) The Supreme Court of Alabama erred in holding that subdivision (d) of Section 42, Title 46, Code of Alabama of 1940 does not without due process of law deprive petitioners of the porperty right to pursue the vocation of independent insurance adjusters on like terms and conditions as others similiarly situated.

(5) The Supreme Court of Alabama erred in holding valid and constitutional the statute (Subsection (d) Section 42, Title 46, Code of Alabama of 1940) which it found permitted an adjuster paid full time by an insurance company, to settle and adjust controverted and disputed claims, and denied that right to petitioner an insurance adjuster paid by the hour.

V.

ARGUMENT

POINT A

Subdivision (d) of Section 42, Title 46, Code of Alabama of 1940 as construed by the Supreme Court of Alabama denies independent adjusters, and petitioners as such, equal protection of the laws and is unconstitutional and void.

The Alabama Act involved appears in Appendix to Petition as "B".

There is a well defined business or vocation, engaged in by laymen throughout the history of insurance underwriting, consisting of the settling or ad-

justing or disputed or controverted claims against insurance companies.

This suit was brought below to exclude all laymen, whether full time or part time, from this field of activity and to preempt it for lawyers exclusively (R. 4).

The Supreme Court of Alabama, however, has given such meaning to the Alabama statute (Appendix "B") defining the practice of law (Sec. 42, Title 46, Code of Ala. 1940) that it has the effect (a) of permitting laymen to engage in said occupation provided they are hired on a salary basis by one company or a group of companies acting together and (b) of denying the right to other laymen equally well qualified, equally honest equally entitled to earn a living, equally acceptable to the insurance companies involved and equally taxed through licenses for engaging in this vocation, merely because they serve on a part time basis for two or more insurance companies who do not act as a group and who pay them by the hour.

Each type of adjuster is licensed by the State of Alabama (Section 455, Title 51, Code of Alabama 1940) and is entitled to the equal protection of its laws.

The Supreme Court of Alabama takes the view that adjusters paid by the hour are not "employees in the ordinary sense" within the meaning of the said statute. This Court will, we assume, take judicial notice of the fact that an overwhelming majority of employees in the United States are paid by the hour. Employees paid thus are more truly than any others,

within the terms of statute "employees in the ordinary sense".

There is no basis for claiming that the public interest will be served; nor that the insurance business will be served; nor even that the interest of the salaried adjuster will be served by the holding the salaried laymen may adjust while his fellow, paid differently, may not. This anomaly comes about as a by-product of the fight by some lawyers to preempt the field of adjusting controverted or disputed insurance claims for the legal profession. The only two previous cases in the United States squarely on this point held against the Bar as does this case in so far as the full time adjuster is concerned. See: *Liberty Mutual Ins. Co. v. Jones,* (Missouri) 130 S. W. (2d) 945; *State of Wis., ex rel v. Rice,* (Wisconsin) 294 N. W. 550. In the case at bar the Court substantially follows the two cited cases but draws an arbitrary distinction against non-salaried adjusters and bases its decision on the Alabama statute defining the practice of law above cited.

The classification set up is entirely arbitrary and has no relation to any public interest or private right involved.

The Supreme Court of Alabama attempts to justify by reference to the case of *Bryce v. Gillespie,* 160 Va. 137; 168 S. E. 653. That case is dealing with an entirely different aspect of this factual situation.

May we refer this Court to one of its cases dealing with somewhat similar facts under the Fourteenth Amendment? We refer to the case of *Hartford Steam Boiler Inspection and Insurance Company v. Harri-*

son, 301 U. S. 459; 57 S. Ct. 838. The State of Georgia adopted a statute, the effect of which was that mutual insurance companies could perform certain acts in Georgia through the agency of full time salaried employees, but stock insurance companies such as the Hartford Company were required to perform the same acts through agents paid on commission basis. This Court held that there was no basis for this classification and for convenience we quote part of the opinion:

> "* * * That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' * * * Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. * * *
>
> "Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safe-guard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. * * * They cannot stand as reasonable if they offend the plain standards of common sense. In this instance, the appellant company had been licensed to do business in the State and was entitled to equal protection in conducting that business. The answer of the insurance commissioner admitted that he was 'entirely satisfied as to the character, standing, responsibility, ability, and knowledge' of the proposed agent, and that the license was

refused solely because he was a 'salaried' employee. It is plain that the requirement that the resident agents of stock companies should not work on a salary has no relation to economy or efficiency in management. The answer of the insurance commissioner states that all of the contracts of mutual fire and casualty insurance companies are 'negotiated by salaried employees' and this method of doing business was adopted 'in order to reduce the expenses of operation and thus benefit the policyholders themselves'.

"It is idle to elaborate the difference between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences. We can discover no reasonable basis for permitting mutual insurance companies to act through salaried resident employees and exclude stock companies from the same privilege. * * *"

May we mention a decision by the Supreme Court of Oklahoma? *State of Oklahoma, ex rel. Short v. Reidell,* 109 Okla. 35; 233 Pac. 684; 42 A. L. R. 765. The public accountants of Oklahoma secured the adoption by that State of an Act providing that public and professional accountants who had not passed the State Board of Accountancy test could not engage in accounting work or advertise themselves as qualified to serve the public. The Supreme Court of Oklahoma in an able opinion held that this statute denied the equal protection of the laws to the uncertified accountants. We quote only the concluding paragraph:

"Our conclusion, therefore, is that the act, in

so far as it prohibits uncertified accountants from holding themselves out as professional or expert accountants or auditors for compensation or engaging in the practice of that profession, is in conflict with the spirit and express provision of the Constitution and void, in this, that it abridges the right of private property and infringes upon the right of contract in matters purely of private concern bearing no perceptible relation to the general or public welfare, and thereby tends to create a monopoly in the profession of accountancy for the benefit of certified accountants, and denies to uncertified accountants the equal protection of the laws and the enjoyment of the gains of their own industry. The defendants are not engaged in the exercise of a franchise, but a constitutionally guaranteed right."

POINT B

Subdivision (d), Section 42, Title 46, Code of Alabama 1940 as construed by the Supreme Court of Alabama recognizes that the adjustment of controverted and disputed claims is a legitimate business or occupation in which certain laymen may engage. It denies the right to follow that occupation to independent insurance adjusters because they are paid by the hour and by so doing it deprives petitioners and other independent insurance adjusters of liberty and property without due process of law.

The salaried adjuster according to the definition laid down by the Supreme Court of Alabama need

have no different qualifications, no different character, no different capacities and pay no different licenses from the part-time adjuster. In fact, the part-time adjuster can become the salaried adjuster by a change merely in the method of his compensation.

We submit that to deny the part-time adjuster the right to engage in this gainful occupation serves no public interest and in fact no private interest unless it be slightly to reduce competition with the lawyers.

Of all the cases decided by this Court on due process of law, we beg leave to quote three sentences from *Allgeyer v. State of Louisiana,* 165 U. S. 590; 41 S. Ct. 832:

> "* * * Again on page 764 (589), the learned Justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again, on page 765 (590): 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him, to a certain extent, of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the 14th Amendment."

A great part of the adjusting for insurance companies throughout the country the Court judicially knows, is done by independent insurance adjusters. Certainly over ninety per cent of the insurance companies doing casualty business use independent or part-time adjusters for some of their work whom they pay, as the Supreme Court says, by the hour. It will be a gross blow to these companies, as much so as to their independent adjusters, if this practice is disrupted, especially in this time of man power shortage.

Only a very few of the very largest casualty insurance companies have sufficient business throughout the whole country that they can keep a salaried adjuster in reach of every insured. The other companies must depend on the independent adjuster to service their assureds, or they are driven to hiring lawyers wit htheir higher training and cost to do a service which a competitor insurance company has done by a salaried layman.

Insurannce companies when joined in a suit attempting to accomplish this end directly, fought it vigorously and successfully in Alabama. See the case in which this petitioner was joined as a party, along with many insurance companies by the same Bar.

> *Birmingham Bar Association v. Phillips & Marsh, J. L. Wilkey, et al.*, 239 Ala. 650; 196 So. 725.

If the judgment of the Supreme Court of Alabama is allowed to stand there will have been accomplish-

ed indirectly, what the same Court refused to permit directly.

We urge that the State has no right to destroy the well recognized vocation of independent insurance adjuster.

We quote from this Court's general statement on that question in *New State Ice Co. v. Liebman,* 285 U. S. 262; 52 S. Ct. 371:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that Amendment, nothing is more clearly settled than that it is beyond the power of a State, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' "

We recognize the pressure of work on this Court. This case does involve vital rights of petitioners, a question of substantial public importance and one where rights guaranteed by the United States Constitution are denied, and for that reason this petition is most respectfully and urgently presented.

James A. Simpson

JAMES A. SIMPSON,
Counsel for Petitioners.

STATE OF ALABAMA}
JEFFERSON COUNTY }

I have served a copy of the foregoing Petition for Writ of Certiorari and brief upon Hon. Wm. Marvin Woodall and upon Hon. Francis Hare, counsel for respondents, at their offices in the City of Birand Ji mC. Smith at their offices in the City of Birmingham, Alabama on this the 23 day of September, 1943.

This the 23 day of September, 1943.

James A. Simpson

JAMES A. SIMPSON
Counsel for Petitioners.

Sworn to and subscribed before me this the 23 day of September, 1943.

Connie Cowart

Notary Public